Supreme Court, U.S.
FILED
JUL 20 2007
OFFICE OF THE CLERK

(6)

(2)

No. 06-1709

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID EICHENLAUB, et al.,
Petitioners,

v.

TOWNSHIP OF INDIANA,
Respondents,

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION
(FOR RESPONDENTS OTHER THAN CLAUS)

CHARLES W. CRAVEN
MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN
1845 Walnut Street
Philadelphia, PA 19103
(215) 575-2626
Counsel of Record for Respondents
(Other than Dorothy Claus)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION 1
COUNTERSTATEMENT OF THE CASE 2
REASONS FOR DENYING THE PETITION 3
I. THE PETITION WAS FILED TOO LATE 3
II. PETITIONERS CONCEDED THE APPLICATION OF THE *LEWIS* STANDARD 4
III. THE PETITION DOES NOT CHALLENGE THE APPLICATION OF *LEWIS* TO A LAND USE CASE IN *CUYAHOGA FALLS* 7
IV. CURRENT CASE LAW PROVIDES NO SUPPORT FOR THE PETITION'S "IMPROPER MOTIVE" STANDARD OR ITS CIRCUIT CENSUS 8
V. USE OF THE "SHOCKS THE CONSCIENCE" STANDARD DOES NOT CONFLICT WITH THE COURT'S SUBSTANTIVE-DUE-PROCESS CASES 18
CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Albright v. Oliver, 510 U.S. 266 (1994) 17

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996)..... 17

Armstrong v. Squadrito, 152 F.3d 564 (7th Cir. 1998)..... 15

Banks v. City of Whitehall, 344 F.3d 550 (6th Cir. 2003)..... 14

Bonebrake v. Norris, 417 F.3d 938 (8th Cir. 2005)..... 16

Brody v. City of Mason, 250 F.3d 432 (6th Cir. 2001), ... 14

Burton v. Richmond, 370 F.3d 723 (8th Cir. 2005) 16

Chavez v. Martinez, 538 U.S. 760 (2003)..... 7

Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992)..... 16

Christensen v. County of Boone, 483 F.3d 454 (2007)..... 15

City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) 1, 7

Clubside, Inc. v. Valentin, 468 F.3d 144 (2nd Cir. 2006)..... 10

Collins v. Harker Heights, 503 U.S. 115 (1992) 8

Conroe Creosoting Co. v. Montgomery County Texas, 249 F.3d 337 (5th Cir. 2001) 13

County of Sacramento v. Lewis, 523 U.S. 833 (1998).. passim

Crowley v. Courville, 76 F.3d 47 (2nd Cir. 1996) 10

Davis v. Rennie, 264 F.3d 86 (1st Cir. 2001)..... 9

Dunn v. Fairfield Community High School District No. 225, 158 F.3d 962, (7th Cir. 1998) 15

Eichenlaub v. Township of Indiana, 385 F.3d 274 (3rd Cir. 2004) ..... passim

Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001) 16

Fontana v. Haskin, 262 F.3d 871 (9th Cir. 2001)..... 17, 18

Galdikas v. Fagan, 342 F.3d 684 (7th Cir. 2003)..... 15

Graham v. Connor, 490 U.S. 386 (1989) 17

Harlen Assocs. v. Incorporated Village of Mineola, 273 F.3d 494 (2nd Cir. 2001)..... 10

Hart v. City of Little Rock, 432 F.3d 801 (8th Cir. 2005)..... 16

Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999) 11

Hibbs v. Winn, 542 U.S. 88 (2004)..... 3

Iowa Coal Mining Co. v. Monroe County, 257 F.3d 846 (2001)..... 16

Kennedy v. City of Ridgefield, 439 F.3d 86 (9th Cir. 2006), rehearing den., 440 F.3d 1091 (9th Cir. 2006)..... 16

Khan v. Gallitano, 180 F.3d 829 (7th Cir. 1999)..... 14

Koscielski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006) 16

Lisa's Party City, Inc. v. Town of Henrietta, 185 F.3d 12 (2nd Cir. 1999) 11

Madison v. Graham, 316 F.3d 867 (9th Cir. 2002) 17

Mercer v. Theriot, 377 U.S. 152 (1964) 3

Missouri v. Jenkins, 495 U.S. 33 (1990)..... 3

Mongeau v. City of Marlborough, -- F.3d -- (1st Cir. 2007) (No. 06-2666) (2007 U.S. App. LEXIS 14812; June 22, 2007) 9, 10

Montgomery v. Stefaniak, 410 F.3d 933 (7th Cir. 2005) 15

Moran v. Burbine, 475 U.S. 412 (1986)..... 7

Morris v. Dearborne, 181 F.3d 657 (5th Cir. 1999)..... 13

Natale v. Town of Ridgefield, 170 F.3d 258 (2nd Cir. 1999) 11

Nestor Colon Medina & Sucesores, Inc. v. *Custodio*, 964 F.2d 32 (1st Cir. 1992)..... 9

O'Connor v. Pierson, 426 F.3d 187 (2nd Cir. 2005)..... 11

O'Mara v. Township of Wappinger, 485 F.3d 693 (2nd Cir. 2007)..... 10

Pagan v. *Calderon*, 448 F.3d 16 (1st Cir. 2006)..... 9

PFZ Properties, Inc. v. *Rodriguez*, 928 F.2d 28 (1st Cir. 1991)..... 10

Reese v. Georgia, 350 U.S. 85 (1955)..... 4

Russo v. City of Bridgeport, 479 F.3d 196 (2nd Cir. 2007).. 11

Schroder v. City of Fort Thomas, 412 F.3d 724 (6th Cir. 2005)..... 14

SFW Arecibo, Ltd. v. *Rodriguez*, 415 F.3d 135 (1st Cir. 2005)..... 9

Simi Investment Co. Inc. v. Harris County Texas, 236 F.3d 240 (5th Cir. 2000)..... 13

Singleton v. Cecil, 176 F.3d 419 (8th Cir. 1999)..... 16

Sochor v. Florida, 504 U.S. 527 (1992)..... 4

Squaw Valley Development Co. v. Goldberg, 375 F.3d 936 (9th Cir. 2004)..... 17

United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392 (3rd Cir. 2003).... 1, 2, 5, 18

Urie v. Thompson, 337 U.S. 163 (1949)..... 4

WMX Tech., Inc. v. Gasconade County, 105 F.3d 1195 (8th Cir. 1997)..... 16

Young v. City of Mt. Ranier, 238 F.3d 567 (4th Cir. 2001).. 12

Rules

Supreme Court Rule 15.2..... 2

Treatises

Stern's *Supreme Court Practice*..... 4

INTRODUCTION

Respondents (other than Dorothy T. Claus, who has her own attorney) respectfully ask this Honorable Court to deny the Eichenlaubs' certiorari petition for five independently compelling reasons.

First, the petition was filed far too late to allow certiorari review of the Court of Appeals' September 21, 2004 confirmation that petitioners' substantive due process claim was no longer viable. *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 285-286 (3rd Cir. 2004); App. 16a-19a.

Second, petitioners waived the issue raised by their petition, because they admitted, without qualification or reservation, in both the District Court and the Court of Appeals, that their substantive due process claim was controlled by the "shocks the conscience" standard enunciated in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and applied to land-use cases by *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3rd Cir. 2003).

Third, the petition does not challenge or offer a valid reason to overrule this Court's application of *Lewis* to a land use case in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198-199 (2003).

Fourth, current case law provides no support for petitioners' "improper motive" test, and refutes their specter of an "exacerbate[d]," "entrenched," "intractable," "intensified," "deep," "seven-to-four" conflict among the circuits, confusion among the lower courts, and a "glaring lack of uniformity throughout the Nation" (Pet. 13, 16, 17, 27).

Fifth, the Court of Appeals' application of *Lewis* to substantive due process claims in land-use cases does not conflict with, but rather implements this Court's precedents.

COUNTERSTATEMENT OF THE CASE

Because the petition seeks review of the nearly three-year old final order which confirmed the elimination of the petitioners' substantive due process claim in *Eichenlaub I* (Pet. 11), for purposes of Supreme Court Rule 15.2, respondents incorporate by reference the more balanced and appropriate statement of the case presented in that opinion, 385 F.3d at 277-279 (App. 2a-6a). The petition persistently obscures, but the Court of Appeals appreciated, that the dispute between petitioners and respondents stems from a difference of opinion about the applicability of land-use regulations which came into existence during the many years before petitioners decided to improve their properties. *Id.* at 276-277 (App. 2a).

In addition, as discussed more fully below, petitioners admitted, without qualification or reservation, in both the District Court and the Court of Appeals, that the application of *Lewis* to substantive due process claims in land-use cases by *United Artists* controlled this case. *See*, Petitioners' "Supplemental Brief in Opposition to Defendants' Motions for Summary Judgment," p. 1-3, 8-11; petitioners' Brief of Appellants, p. 30-31, 33-41; petitioners' Reply Brief, p. 12-16; *Eichenlaub I*, *supra*, 385 F.3d at 285 (App. 16a) ("The District Court properly held, and **the Eichenlaubs do not dispute, that whether a zoning official's actions or inactions violate due process is determined by utilizing a 'shocks the conscience' test.**") (emphasis added).

The petition weaves First Amendment retaliation throughout its statement of the petitioners' case (Pet. 4, 5, 7), but only David Eichenlaub asserted a First Amendment retaliation claim. *Eichenlaub I*, *supra*, 385 F.3d at 277, 278 (App. 2a, 4a-5a). Moreover, the jury's award on that claim and the District Court's awards of trial and appellate attorneys fees to the Eichenlaubs have been paid in full. The petition does not delineate what separate damages, if any, might attach to petitioners' substantive due process claim.

REASONS FOR DENYING THE PETITION

I. THE PETITION WAS FILED TOO LATE

The petition, filed on June 25, 2007, should be denied, because it was filed nearly three years too late to allow this Court to review the Court of Appeals' decision in *Eichenlaub I*, which was final and reviewable on September 21, 2004.

To be timely, a certiorari petition must be filed in a civil case such as this within 90 days of the date of the judgment on which review is sought. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) ("Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional."). *See also*, *Hibbs v. Winn*, 542 U.S. 88, 97 (2004) ("Section 2101(c) instructs that a petition for certiorari must be filed 'within ninety days after the entry of . . . judgment.'").

Although a "timely rehearing petition, a court's appropriate decision to entertain an untimely rehearing petition, and a court's direction, on its own initiative, that the parties address whether rehearing should be ordered" might postpone the finality of a Court of Appeals' decision, *Hibbs*, *supra*, 542 U.S. at 98, none of those factors is involved in this case.

Using *Mercer v. Theriot*, 377 U.S. 152 (1964), as its principal support, the petition asserts that the above analysis is "exactly wrong," because "[i]t is hornbook law that this Court may grant certiorari from a second appellate decision in a given case and may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal." (Pet. 12-13 n. 2; internal quotation marks omitted.) As far as it goes, that principle is incontestable, but it does not encompass this case.

Mercer involved the grant of a new trial in the first appeal which kept the issue alive on remand, and thus presented an interlocutory decision from which a petition for a writ of

certiorari could not be filed. That is also the procedural situation contemplated by the petitioners' excised quote from Stern's *Supreme Court Practice*, and it is the same situation encountered in *Reese v. Georgia*, 350 U.S. 85 (1955) (first appeal vacated judgment and remanded for new trial).

But, the procedural posture of this case is far different, because the petitioners' substantive due process claim did not survive summary judgment in the District Court and its demise was confirmed in *Eichenlaub I*.

The procedural posture of this case also differs greatly from that in *Urie v. Thompson*, 337 U.S. 163, 171-172 (1949), where this Court could not review the first decision of the state court, because it remanded for a trial, not for dismissal, and its initial decision was interlocutory. It was only after the second state court appeal that the appellant had the first opportunity to invoke the Court's jurisdiction. *Id.*, 337 U.S. at 173 n. 12 (appellant "invoked the jurisdiction of this court at the first opportunity open to [him]").

In contrast, petitioners' first opportunity to contest the Court of Appeals' decision in *Eichenlaub I* came and went nearly three years before they filed their petition, when the Court of Appeals affirmed that petitioners' substantive due process claim was no longer part of this case. As such, the petition is too late to trigger this Court's certiorari jurisdiction and should be denied.

II. PETITIONERS CONCEDED THE APPLICATION OF THE *LEWIS* STANDARD

This Court lacks jurisdiction to decide issues which petitioners have not preserved in the lower courts. *See, e.g.*, *Sochor v. Florida*, 504 U.S. 527, 533-534 (1992) (Court lacks jurisdiction to decide issue not preserved). Consequently, the petition in this case should be denied, because it seeks to challenge the use of a standard which the petitioners not only failed to contest when they had the opportunity to do so years ago, but whose application they

conceded in both the District Court and in the Court of Appeals, without qualification or reservation. *Eichenlaub I*, *supra*, 385 F.3d at 285 (App. 16a) ("The District Court properly held, and **the Eichenlaubs do not dispute, that whether a zoning official's actions or inactions violate due process is determined by utilizing a 'shocks the conscience' test.**") (emphasis added).

Footnote 1 at pages 11-12 of the petition struggles to dispel the obvious conclusion that the petitioners failed to preserve their contention that the Court of Appeals applied the wrong standard and that the defunct and discredited "improper motive" test should by resurrected and applied by this Court to substantive due process claims in land-use cases. The footnote rationalizes that, because a panel of the Third Circuit usually does not disregard a prior panel's decision, petitioners "were under no obligation to do anything more than" to note in their appellate briefs that "they had at all times advocated for the 'improper motive' standard ... but then argue the appeal under the controlling standard in the Third Circuit." (Pet. 12, n. 1.)

However, the petition does not explain why petitioners could not and did not raise essentially the same arguments which they raise in their petition in order to seek an *en banc* hearing of their appeal or, at the very least, to pave the way for their petition's arguments.

Moreover, petitioners did not consistently advocate application of the "improper motive" standard, and they were not ambushed by *United Artists* "by the time they filed their appellate briefs." (Pet. 13, n. 1.)

To the contrary, before considering the parties' respective exceptions to the Magistrate Judge's report and recommendation, the District Court allowed the parties to file supplemental briefs concerning the applicability of *United Artists*. (App. 36a.) At that time, petitioners abandoned the "improper motive" standard and embraced the "shocks the conscience" standard without reservation or condition. *See*,

petitioners' "Supplemental Brief in Opposition to Defendants' Motions for Summary Judgment," p. 1-3, 8-11 (anticipating that defendants would rely on *United Artists*; admitting that the Third Circuit "[i]ndisputably" overruled use of the "improper motive" test and adopted the *Lewis* "shocks the conscience" standard in *United Artists*; asserting that petitioners' evidence satisfied the *Lewis* standard; and, contending that the defendants conduct was similar to the conduct of municipal defendants found in other cases to have been "arbitrary and capricious and to 'shock the conscience.'").

Petitioners' abandonment of the "improper motive" standard and their unconditional acceptance of the "shocks the conscience" standard extended into their appeal in *Eichenlaub I*. Petitioners' Brief of Appellants (p. 30-31, 33-41) admitted adoption of the "shocks the conscience" standard in *United Artists*, but asserted that respondents' conduct "shocks the conscience." Furthermore, petitioners' Reply Brief (p. 12-16; emphasis added) stated, "**All parties to this appeal agree that this Circuit's holding in *United Artists Theatre Circuit, Inc. v. Twp of Warrington*, 316 F.3d 392, *reh'g den.*, 324 F.3d 113 (3d Cir. 200[3]) requires that a 'shocks the conscience' analysis be applied,**" and then argued that summary judgment for respondents under that standard was error.

After unequivocally and repeatedly telling both the District Court and the Court of Appeals that the "shocks the conscience standard," rather than the "improper motive" standard, controlled their substantive due process claim, petitioners cannot and should not be heard to claim the opposite to this Court. Consequently, because petitioners failed to preserve the issue that the Court of Appeals applied the wrong standard, the petition should be denied.

III. THE PETITION DOES NOT CHALLENGE THE APPLICATION OF *LEWIS* TO A LAND USE CASE IN *CUYAHOGA FALLS*

The petition argues that *Lewis* had no intended impact beyond high-speed police chases and prison riots (Pet., p. 23-25), and it asserts categorically that "[t]here are good reasons why this Court has never extended 'shocks the conscience' beyond its original police-and-prisons context," meaning high-speed chases and prison riots. (*Id.*, p. 25.)

However, the petition fails to acknowledge that this Court unhesitatingly applied *Lewis* to a land-use matter in *Cuyahoga Falls*, *supra*, 538 U.S. at 198-199 ("We need not decide whether respondents possessed a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998) (noting that in our evaluations of "abusive executive action," we have held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'").").

Furthermore, the petition ignores the Court's application of the *Lewis* standard beyond the narrow scope of high-speed police chases and prison riots to the interrogation of a witness in a hospital in *Chavez v. Martinez*, 538 U.S. 760, 774 (2003), and to alleged police deception of an arrestee in *Moran v. Burbine*, 475 U.S. 412, 432-433 (1986).

Moreover, the petition's arguments fail to appreciate that the *Lewis* standard equates "shocks the conscience" with "most egregious" and "arbitrary in the constitutional sense," and uses those terms interchangeably. In addition to the above quote from *Cuyahoga Falls*, the Court's opinion in *Lewis* expressly draws that that equation. In that opinion, the Court observed that "the core of the concept" of due process is "protection against arbitrary action" and that "only the most egregious official conduct can be said to be 'arbitrary in

the constitutional sense.'" *Lewis*, *supra*, 523 U.S. at 845-846 (citation omitted). After noting its long history of speaking of "the cognizable level of executive abuse of power as that which shocks the conscience," the Court noted that, in *Collins* v. *Harker Heights*, 503 U.S. 115, 128 (1992), it "said again that the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Lewis*, *supra*, 523 U.S. at 846, 847.

Likewise, footnote 7 at page 23 of the petition ignores those dimensions of the *Lewis* standard to mistakenly downplay the significance of the Court's holding in *Collins*, an employee safety claim, in which the Court held, "We also are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as **arbitrary, or conscience shocking, in a constitutional sense**." (Emphasis added.) *Collins*, *supra*, 503 U.S. at 128.

The petition should be denied, because it does not challenge the foregoing applications of the *Lewis* standard.

IV. CURRENT CASE LAW PROVIDES NO SUPPORT FOR THE PETITION'S "IMPROPER MOTIVE" STANDARD OR ITS CIRCUIT CENSUS

Significantly, the petition does not cite -- and respondents' independent research has not found -- any currently authoritative federal appellate court decision which supports the use of petitioners' defunct "improper motive" test.

Moreover, current case law refutes petitioners' specter of an "exacerbate[d]," "entrenched," "intractable," "intensified," "deep," "seven-to-four" conflict among the circuits, confusion among the lower courts, and a "glaring lack of uniformity throughout the Nation" (Pet., p. 13, 16, 17, 27).

As the following circuit review demonstrates, the petition's census must be completely realigned, and that realignment reveals no need for intervention by this Court.

FIRST CIRCUIT. To position the First Circuit, the petition first relies on *Davis v. Rennie*, 264 F.3d 86 (1st Cir. 2001), a case which focused on jury instructions concerning the failure of mental health workers to stop the beating of a restrained, involuntarily committed patient. Those instructions employed the "deliberate indifference" standard, telling the jury, in sum, to "determine as to each defendant whether he or she actually knew of Mr. Bragg's alleged punching, whether he or she could have prevented it, whether there was enough time to do so, and whether he or she failed to do so." *Davis*, 264 F.3d at 97. The District Court declined to add the requirement that the jury also find that the defendant's conduct "shocked the conscience," and the First Circuit affirmed. *Id.*, at 99-100. That decision, however, is fully consistent with *Lewis*, because, as noted in *Lewis*, deliberate indifference alone is "enough to satisfy the fault requirement for due process claims" based on the analogous situation involving the medical needs of someone jailed while awaiting trial. *Lewis, supra*, 523 U.S. at 850.

After incorrectly construing *Davis*, the petition flatly declares that "[t]he First Circuit also declines to apply *Lewis* in land-use cases; it instead regularly has applied a disjunctive test that mentions the *Lewis* standard but can be met without conscience-shocking behavior." (Pet., p. 18, n. 3.) However, in *Mongeau v. City of Marlborough*, -- F.3d -- (1st Cir. 2007) (No. 06-2666) (2007 U.S. App. LEXIS 14812; June 22, 2007) , a land-use case, the First Circuit reconfirmed that "a plaintiff may prevail on a substantive due process claim only if the defendant has engaged in behavior that 'shocks the conscience,'" citing *Pagan* v. *Calderon*, 448 F.3d 16, 32 (1st Cir. 2006); *SFW Arecibo, Ltd.* v. *Rodriguez*, 415 F.3d 135, 141 (1st Cir. 2005); *Nestor Colon Medina & Sucesores, Inc.* v. *Custodio*, 964 F.2d 32, 45 (1st Cir. 1992)

(quoting *PFZ Properties, Inc.* v. *Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991)).

In addition, *Mongeau* noted that the First Circuit has "stated with 'a regularity bordering on the monotonous' that to be liable for a violation of substantive due process rights, a defendant must have engaged in behavior that is 'conscience-shocking,'" and that the court has "repeatedly affirmed the use of this standard in the context of challenges to land use decisions." *Mongeau*, -- F.3d at -- (2007 U.S. App. LEXIS 14812, p. 7). Furthermore, the court confirmed the breadth of its application of the *Lewis* standard by stating that its "precedent on this issue is both clear and binding on this case: in order to state a substantive due process claim of any ilk, a plaintiff must allege behavior on the part of the defendant that is so outrageous that it shocks the conscience." *Id.*

Given the above, the First Circuit must be realigned with the Third, Tenth, Eleventh and D.C. Circuits.

SECOND CIRCUIT. The petition asserts that the Second Circuit applies "an entirely different standard," under which the court first determines whether the claimant has a valid property interest in the permit or certificate, and then whether the executive acted in an "arbitrary or irrational manner." (Pet., p. 17, citing *O'Mara v. Township of Wappinger*, 485 F.3d 693, 152 (2nd Cir. 2007), *Clubside, Inc. v. Valentin*, 468 F.3d 144 (2nd Cir. 2006), and *Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494 (2nd Cir. 2001). In each of those cases, however, the appellate court ruled in favor of the executive and dismissed the plaintiff's substantive due process claim on the ground that the plaintiff lacked a valid property interest. None of those cases cited, let alone considered, *Lewis*. Moreover, arbitrary or irrational executive action in the land use context obtains "only when government acts with 'no legitimate reason for its decision.'" *Crowley v. Courville*, 76 F.3d 47, 52 (2nd Cir. 1996). As noted above, that standard is hardly "entirely different" from

the "shocks the conscience" standard.

Furthermore, in *O'Connor v. Pierson*, 426 F.3d 187, 203 (2nd Cir. 2005), cited at page 17 of the petition, the Second Circuit squarely recognized that *Lewis* "set the bar higher for challenges to executive action," and that "'only the most egregious official conduct,' conduct that 'shocks the conscience,' will subject the government to liability for a substantive due process violation based on executive action." The court also recognized that *Lewis* swept broadly beyond prison riots and high-speed police chases. *O'Connor*, 426 F.3d at 204 (*Lewis* "did not distinguish between different types of substantive due process claims, so 'constitutionally arbitrary' action for purposes of a property-based substantive due process claim is action that shocks the conscience.").

In addition, less than 10 months after *Lewis* was filed, the Second Circuit quickly applied the "shocks the conscience test" to a land use claim and underscored the limited role that substantive due process and the federal courts had in state land use cases in *Natale v. Town of Ridgefield*, 170 F.3d 258, 262-263 (2nd Cir. 1999). The court applied the standard to another land-use case in *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 17 (2nd Cir. 1999). More recently, the court applied the standard to a Fourth Amendment type claim in *Russo v. City of Bridgeport*, 479 F.3d 196, 209-210 (2nd Cir. 2007).

Given the above, the Second Circuit must be realigned with the First, Third, Tenth, Eleventh and D.C. Circuits.

FOURTH CIRCUIT. The Fourth Circuit must also be realigned to join the First, Second, Third, Tenth, Eleventh and D.C. Circuits.

Shortly after *Lewis* was filed, the Fourth Circuit recognized in *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999) that "Courts now considering any claim of substantive due process violation must look for principal guidance to" *Lewis* and to *Glucksberg*, and that, under *Lewis*,

"the issue of fatal arbitrariness should be addressed as a 'threshold question,' asking whether the challenged conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" Two years later, in *Young v. City of Mt. Ranier*, 238 F.3d 567, 574 (4th Cir. 2001), the court noted the continued broad applicability of the *Lewis* standard stating, "Broadly speaking, the substantive due process provision of the Fourteenth Amendment protects against egregious, arbitrary governmental conduct. See *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998). Only governmental conduct that "shocks the conscience" is actionable as a violation of the Fourteenth Amendment." More recently, in *United States v. Al-Hamdi*, 356 F.3d 564, 574 (4th Cir. 2004), the court reconfirmed that "[a]n executive act can violate substantive due process only when the act shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998)."

The tripartite test partially quoted by the petition from *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002), does not represent a departure from the high standard set by Lewis. That test requires a property claimant to "demonstrate: '(1) that [it] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.'" *Id.* at 440 (citation omitted). The test was formulated, because "[s]ubstantive due process protections 'run only to state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.'" *Id.* (citation omitted). That formulation hardly undermines *Lewis*.

FIFTH CIRCUIT. The Fifth Circuit has not repudiated its decision rendered shortly after *Lewis* in *Morris v. Dearborne*, 181 F.3d 657, 668 (5th Cir. 1999). In *Morris*, which involved a teacher's fabrication of sexual abuse against a student's father, the court recognized and applied the "shocks the conscience" standard, and alternatively expressed that standard as conduct "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" or as "abusive, irrational or malicious abuse of government power that shocks the conscience."

The petition relies on *Simi Investment Co. Inc. v. Harris County Texas*, 236 F.3d 240 (5th Cir. 2000), to position the Fifth Circuit. Yet, that case does not deviate from *Lewis*, because the Court of Appeals recognized "that reliance on substantive due process must be taken with the 'utmost care,'" and it expressly limited its "holding to the type of blatant governmental interference with property rights that is now before us." *Id.* at 249.

Moreover, the petition ignores *Conroe Creosoting Co. v. Montgomery County Texas*, 249 F.3d 337 (5th Cir. 2001), a case relied on heavily by petitioners at pages 38-41 of their Third Circuit Brief of Appellants. In that case, a land-use dispute, the Fifth Circuit explicitly noted that "Courts generally examine due process challenges to executive action by asking 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Id.* at 341 (citation omitted).

Consequently, the Fifth Circuit must be placed with the First, Second, Third, Fourth, Tenth, Eleventh and D.C. Circuits.

SIXTH CIRCUIT. The petition's circuit census must also be corrected to include the Sixth Circuit with the First, Second, Third, Fourth, Fifth, Tenth, Eleventh and D.C. Circuits.

Brody v. City of Mason, 250 F.3d 432 (6th Cir. 2001), cited at page 18 of the petition stated that, in a land-use case, "a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the strict sense, meaning 'that there is no rational basis for the ... [administrative] decision,'" and recognized that "[t]his requires a very strong showing. 'The administrative action will withstand substantive due process attack unless it "'is not supportable on any rational basis'" or is "'willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case.'" *Id.* at 438 (citations omitted). But, as noted above with respect to other "strict sense" or "constitutional sense" cases, that standard does not differ from the *Lewis* standard.

Moreover, two more recent cases underscore that the Sixth Circuit follows the *Lewis* standard. In *Banks v. City of Whitehall*, 344 F.3d 550, 554-555 (6th Cir. 2003) (citations omitted), a land-use case, the court rejected a substantive due process claim, because "the conduct of Whitehall officials in enforcing those codes and regulations was neither 'arbitrary' nor 'conscience-shocking' in the constitutional sense." Likewise, in *Schroder v. City of Fort Thomas*, 412 F.3d 724, 730-731 (6th Cir. 2005), the court explained that "our cases stress that, where a plaintiff claims that a non-custodial substantive due process violation has occurred because of the government's deliberate indifference, something more must be shown--a something that we have variously described as 'callous[] disregard [for] the risk of injury,' or action 'in an arbitrary manner that "shocks the conscience" or that indicates an[] intent to injure.'"

SEVENTH CIRCUIT. Like the First, Second, Fourth, Fifth, and Sixth Circuits, the Seventh Circuit must also be realigned with the Third, Tenth, Eleventh and D.C. Circuits.

The petition bases its placement of the Seventh Circuit on just one case, *Khan v. Gallitano*, 180 F.3d 829 (7th Cir. 1999). *Khan* does contain language which could be

interpreted to relegate *Lewis* to police chase and pre-trial detention cases, but that language is simply dicta, since the opinion concluded that "we would reach the same conclusion whether we ask [under *Lewis*] if the defendants' conduct shocks our conscience or [under *Washington v. Glucksberg*, 521 U.S. 702 (1997)] if the defendants violated a fundamental right deeply rooted in our tradition and history: Khan's claim fails." *Id.* at 836 (bracketed material added). Significantly, in *Galdikas v. Fagan*, 342 F.3d 684, 690 n.3 (7th Cir. 2003), the Seventh Circuit viewed *Kahn* and similar cases as exhibiting "a more generally perceived confusion as to the interrelationship of *Lewis* and *Glucksberg*," but not as indicia that the court rejected *Lewis* for a more liberal standard.

Moreover, the Seventh Circuit employed the *Lewis* analysis and standard before *Khan* in *Armstrong v. Squadrito*, 152 F.3d 564, 570, 576 (7th Cir. 1998), and in *Dunn v. Fairfield Community High School District No. 225*, 158 F.3d 962, 965-66 (7th Cir. 1998), and the court did not view *Khan* as precluding the application of *Lewis* in later substantive due process cases. *See*, *Christensen v. County of Boone*, 483 F.3d 454, 462 n. 2 (2007) ("When, as in the present case, a plaintiff complains of abusive executive action, this "conscience shocking" test determines liability, rather than the traditional strict scrutiny standard used to measure the constitutionality of legislative acts. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1997) (clarifying this distinction)."); *Montgomery v. Stefaniak*, 410 F.3d 933, 939 (7th Cir. 2005) (wrongful discharge claim) ("The scope of substantive due process, however, is very limited and protects plaintiffs only against arbitrary government action that "shocks the conscience.' *Tun v. Whitticker*, 398 F.3d 899, 902 (7th Cir. 2005) (internal citation and quotation omitted)").

EIGHTH CIRCUIT. Although placing the Eighth Circuit with the Third, Tenth and D.C. Circuits, the petition

mistakenly understated that support by positing an internal division in the Eighth Circuit between the "truly irrational" test and the "shocks the conscience" test. (Pet. 19.) However, *Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846, 853 (2001), referred by the petition as one prong of that alleged division, did not cite or consider *Lewis*, but rather rested on decisions which preceded *Lewis*, e.g., *WMX Tech., Inc. v. Gasconade County*, 105 F.3d 1195, 1199 n. 4 (8th Cir. 1997), and *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992). The other prong to the petition's assertion, *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006), actually disproves the alleged internal split, because that case draws a clear equation between the "truly irrational" test and the "shocks the conscience" test. The same equation was noted by the en banc court in *Singleton v. Cecil*, 176 F.3d 419, 425 n. 7 (8th Cir. 1999).

In addition to *Koscielski* and *Singleton*, the Eighth Circuit recognized the applicability of the *Lewis* "shocks the conscience" test in *Entergy Ark., Inc. v. Nebraska*, 241 F.3d 979, 991 (8th Cir. 2001), and in numerous other cases, including: *Hart v. City of Little Rock*, 432 F.3d 801, 806 (8th Cir. 2005), a "state created danger" case; *Bonebrake v. Norris*, 417 F.3d 938, 943 (8th Cir. 2005), a delayed incarceration case; *Neal v. Fields*, 429 F.3d 1165, 1166 (8th Cir. 2005), an employment claim; and, *Burton v. Richmond*, 370 F.3d 723, 729 (8th Cir. 2005), a social services placement claim.

NINTH CIRCUIT. The petition misconstrues the significance of *Kennedy v. City of Ridgefield*, 439 F.3d 86 (9th Cir. 2006), rehearing den., 440 F.3d 1091 (9th Cir. 2006). That case and the quarrel raised by the dissent from the decision to deny rehearing focused on an extension of the "state created danger" doctrine. There was no assertion that "shocks the conscience" had to be proven to establish liability under that doctrine; rather, the controversy concerned

whether the doctrine should be extended.

The petition also overlooks the tendency of the Ninth Circuit to heed this Court's admonitions in *Lewis*, *supra*, 523 U.S. at 843, in *Albright v. Oliver*, 510 U.S. 266, 272 (1994), and in *Graham v. Connor*, 490 U.S. 386 (1989), that substantive due process claims should be analyzed under specific Amendments. For example, property claims are thus treated – and largely dismissed -- under the Fifth Amendment's "taking clause." *Armendariz v. Penman*, 75 F.3d 1311, 1327 (9th Cir. 1996) (en banc); *Madison v. Graham*, 316 F.3d 867, 871 (9th Cir. 2002); *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 949-950 (9th Cir. 2004) ("The parties have not cited to any post-*Armendariz* case, and our research has revealed none, where this Circuit upheld a substantive due process claim based on a deprivation of real property."). Similarly, sexual misconduct by police toward an arrestee is treated under the Fourth and the Eighth Amendments, *Fontana v. Haskin*, 262 F.3d 871, 881-882 (9th Cir. 2001).

However, *Squaw Valley* illustrates that the Ninth Circuit recognizes that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," and that "[t]he substantive component of the Due Process Clause 'forbids the government from depriving a person of life, liberty, or property in such a way that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *Squaw Valley*, 375 F.3d at 948. The case also demonstrates that, even though one defendant "harbor[ed] actual 'hostility' and 'antagonism' toward" the property owner and had no factual support for his claim that the owner failed to comply with regulations, *id.* at 947, and even though the defendants subjected the owner to "selective and overzealous enforcement" and "to a tyrannical regime of regulatory abuse designed to drive the resort out of business," the owner did not have an actionable claim under the Fourteenth or the Fifth Amendments. *Id.* at 948.

Moreover, *Fontana* illustrates that the court would use the "shocks the conscience" standard under *Lewis* in a Fourteenth Amendment analysis. *Fontana*, 262 F.3d at 882 n. 7 ("Under the Fourteenth Amendment's substantive due process prong, we use the 'shocks the conscience' test. The threshold question is 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'") (citations omitted).

The petition should be denied, because the case law does not support petitioners' "improper motive" standard, nor does it demonstrate a division among the circuit courts to support their call for this Court's intervention.

V. USE OF THE "SHOCKS THE CONSCIENCE" STANDARD DOES NOT CONFLICT WITH THE COURT'S SUBSTANTIVE-DUE-PROCESS CASES

The petition asserts that applying the "shocks the conscience" standard is "in direct conflict with this Court's substantive-due-process cases," and that "[t]he Third Circuit erred in concluding that *Lewis* implicitly overruled this Court's earlier precedents." (Pet., p. 21.) Neither of those propositions withstands scrutiny.

Significantly, the petition provides no citation to support its claim that the Third Circuit concluded "that *Lewis* implicitly overruled this Court's earlier precedents." The Court of Appeals did not express that view either in *United Artists*, *supra*, or in *Eichenlaub I*.

Moreover, application of the "shocks the conscience" standard follows *Lewis*, while the "improper motive" deviates from the high standard set and maintained for decades by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

CHARLES W. CRAVEN
MARSHALL, DENNEHEY,
WARNER, COLEMAN & GOGGIN
1845 Walnut Street
Philadelphia, PA 19103
Counsel for Respondents
(except Claus)
(215) 575-2626